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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

In the Matter of: )  
 )  
 Implementation of Section )  
 309(j) for Competitive )  
 Bidding )  
 )  
 Reexamination of the Policy )  
 Statement on Comparative )  
 Broadcast Hearings )  
 )  
 Proposals to Reform the )  
 Comparative Hearing Process )

MM Docket No. 97-234

GC Docket No. 92-52

GEN Docket No. 90-264

To: The Commission

COMMENTS OF WILLSYR COMMUNICATIONS, LIMITED PARTNERSHIP  
IN RESPONSE TO NOTICE OF PROPOSED RULEMAKING

Respectfully submitted,

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January 26, 1998

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COMMENTS IN RESPONSE TO NOTICE OF PROPOSED RULEMAKING

Willsyr Communications, Limited Partnership ("Willsyr"), by its counsel, pursuant to 47 C.F.R. 1.415 and 1.419, hereby submits its comments in response to the "Notice of Proposed Rulemaking" in MM Docket No. 97-234, GC Docket No. 92-52, and GEN Docket No. 90-264, rel. November 26, 1997. Therein, the Federal Communications Commission ("FCC") requested comments with respect to: (a) implementation of Section 309 as to competitive bidding for commercial broadcast licenses; (b) reexamination of the policy statement on comparative hearings; and (c) proposals to reform the comparative hearing process to expedite resolution of cases.

The Background and Status of Willsyr's Application  
in the Biltmore Forest Proceeding

Willsyr is a limited partnership which is headed by an African-American female general partner with extensive past broadcast experience. The limited partners have extensive past broadcast ownership and management experience. The general partner previously worked at broadcast stations owned by the limited partners.

The general partner and the limited partners had known each other for several years in a professional and business relationship prior to the filing of their FCC application. The Willsyr application was structured in accordance with then existing FCC policy in order to maximize the benefit from the FCC's preferences for "integration" of ownership into management and for minority and female control.

Willsyr is one of five competing applicants in a pending proceeding (MM Docket No. 88-577) for a construction permit for a

new FM broadcast station in Biltmore Forest, North Carolina, to operate on Channel 243 A. Willsyr filed its application in 1987. It went through a lengthy and contentious multi-party comparative hearing in 1989.

Although found basically qualified by the Administrative Law Judge ("ALJ"), the Review Board, and by the FCC, Willsyr was not ranked as the superior applicant under the "integration" comparative criteria. Orion Communications Limited ("Orion") was the only applicant awarded 100% integration credit. See, National Communications Industries, 5 FCC Rcd 2862 (ALJ 1990); 6 FCC Rcd 1978 (Rev. Bd. 1991); 7 FCC Rcd 1703 (1992); Liberty Productions, a Limited Partnership, 7 FCC Rcd 7581 (1992); 8 FCC Rcd 4264 (1993). The decisions of the FCC were appealed to the U.S. Court of Appeals for the D.C. Circuit. See, Case No. 92-1645 and Consolidated Case Nos. 93-1465, 93-1466, and 93-1470.

A primary issue on appeal was whether the FCC had misapplied its "integration" criteria to favor Orion, a non-minority applicant that was a local broadcaster. The award of 100% quantitative integration to Orion was improperly based upon credit for Betty Lee as a proposed manager/owner of the Biltmore Forest FM station.

During the over 40 years that Betty Lee's husband, Zeb Lee, who is a co-owner of Orion, had owned and operated an AM broadcast station (WSKY) in Asheville, she had no appreciable management or ownership role. The appealing applicants contended that Betty Lee's "integration" proposal in the Biltmore Forest application was

a "sham" which was designed to garner Orion a then applicable gender preference for "female" management and ownership.

Another primary issue on appeal was whether Orion had the required financial qualifications and whether it had made misrepresentations or lacked candor in this respect. Orion failed to disclose to the FCC the fact that the IRS had imposed substantial tax liens against its principals and their AM station.

After the briefs were filed, but prior to oral argument, the D.C. Circuit rendered its decision in Bechtel v. FCC, 10 F.3d 875 (D.C. Cir. 1993), which found the "integration" criteria to be inherently arbitrary and capricious and peculiarly without foundation. The D.C. Circuit further held that the remedy for applicants, such as Willsyr, whose applications had been denied because of the "integration" criteria is entitlement to a new proceeding in which the FCC considers its application under standards free of such an irrational criteria.

As a result of Bechtel, the D.C. Circuit sua sponte reversed on March 15, 1994, the FCC's decisions in the Biltmore Forest proceeding and remanded all five competing applicants for further consideration under a new selection criteria. This reversal and remand included two applicants that had been disqualified by the FCC. Orion did not seek rehearing of the order to reverse the conditional grant of its application for construction permit and to remand its application, and those of the competing applicants, to the FCC for further consideration under a new selection criteria.

### Orion's Construction and Operation After the Bechtel Decision

The competing applicants filed with the FCC on May 2, 1994, a motion to formally rescind the conditional construction permit of Orion whose grant had been reversed by the D.C. Circuit on March 15, 1994. Orion thereafter first commenced construction on the Biltmore Forest FM frequency on May 27, 1994, and first commenced operations on July 29, 1994. Orion failed to file an application with the FCC for interim authorization to construct and to operate. See, Declaration of Zeb Lee, dated December 4, 1996, in Orion's reply filed with the D.C. Circuit on December 5, 1996.

Orion made the decision to construct and operate after its conditional grant had been reversed because its principals were forced to sell their AM broadcast station to pay IRS tax liens and other debts and outstanding judgments. These IRS tax liens, debts and judgments against Orion's principals were unrelated to the Biltmore Forest FM proceeding, other than the legal fees and expenses that Orion had incurred in prosecuting its FCC application. See, Orion's "Petition for Reconsideration," filed with the FCC on January 16, 1996, pp. 4-8, 13-15, n. 4.

After selling their AM broadcast station, Orion's principals were still burdened with substantial debt and they had no jobs or means to earn an income. Their only unencumbered "asset" was the pending (and now ungranted) Orion application for the Biltmore Forest FM frequency. See, Orion's "Motion for Stay," filed with the FCC on November 6, 1996, p. 3, and Declaration of Zeb Lee, pp.

3-4, paras. 8-9.

Orion's principals borrowed some \$500,000, to pay their existing debts and to construct the Biltmore Forest FM station. The cash flow from the station was to be used to repay the loan and to pay salaries to Orion's principals, who had no other jobs.

The Biltmore Forest FM station was to be used as the collateral for the loan, although at best Orion had a conditional permit from the FCC. However, a bank loan collateralized only by a broadcast station which had a conditional permit from the FCC would appear to violate prudent banking practices and Federal bank lending regulations.

The FCC issued a policy statement by public notice in Modification of Comparative Proceeding Freeze Policy, FCC 94-204, p. 3, rel. August 4, 1994, 9 FCC Rcd 6689. Therein, the FCC stated that permittees, who had commenced construction could continue construction only at their own risk and should not incur additional obligations directed toward construction and operation. The FCC further stated that permittees whose program test authority had already commenced pursuant to orders or decisions which were "non-final," could continue operating in order not to deprive the public of existing service.

In Highlands Broadcasting, Inc., 9 FCC Rcd 5746 (1994), the FCC held that an applicant with a "non-final grant" that had constructed and operated pursuant to program test authority at the time of Bechtel could continue operating. In Highlands, at para.

10, the FCC expressly distinguished its ruling from the situation of Orion, who had constructed and operated after a Bechtel remand from the D.C. Circuit. Moreover, the Highlands applicant had requested interim operating authority from the FCC.

The competing applicants filed two separate petitions for writ of mandamus with the D.C. Circuit. They requested that the FCC be directed to act forthwith on their motion to formally rescind the conditional (and now reversed) construction permit of Orion and order it to cease its unauthorized and "for-profit" operation in favor of a lawful joint interim operator, pursuant to 47 C.F.R. 73.3592 (b) and to established precedent of the D.C. Circuit in Consolidated Nine, Inc. v. FCC, 403 F.2d 585 (D.C. Cir. 1968).

The staff of the Mass Media Bureau, on October 12, 1994, denied the May 2, 1994, motion to rescind the conditional construction permit of Orion. However, on review, the FCC reversed in Orion Communications Limited, FCC 95-456, rel. November 29, 1995. Therein, the FCC required Orion to cease its unauthorized and "for-profit" operations in favor of a joint interim operator. All of the competing applicants were allowed to participate in a non-profit joint interim operation on an equal basis, pursuant to 47 C.F.R. 73.3592 (b).

Orion refused to join in the interim application with the competing applicants, or to file its own interim application. Orion filed a petition for reconsideration with the FCC. Its petition contained numerous contradictory statements, under penalty

of perjury, as to its reasons for commencing construction and operations subsequent to the D.C. Circuit reversing the grant of its conditionally issued construction permit.

The Political Intervention of U.S. Senators Jesse Helms and Lauch Faircloth on Behalf of Orion

After Orion filed its petition for reconsideration, U.S. Senators Jesse Helms and Lauch Faircloth of North Carolina made ex parte presentations to the FCC on its behalf. They demanded that Orion be allowed to continue operating, to the detriment of the competing applicants.

Four of the competing applicants organized a non-profit corporation under the name of Biltmore Forest Radio, Inc. ("BFR") and filed a joint interim application with the FCC. It is a multi-cultural and multi-racial group. The application was placed on public notice on December 4, 1995. Orion failed to file a petition to deny or opposition to grant of the joint interim application.

In Orion Communications Limited, FCC 96-402, rel. October 22, 1996, the FCC reaffirmed the grant of the joint interim application and reaffirmed its decision that Orion must cease its unauthorized and "for-profit" operations in favor of a joint interim non-profit operation. On the same day that the FCC's decision was released, U.S. Senators Jesse Helms and Lauch Faircloth sent an ex parte letter to the FCC Commissioners demanding that Orion not be required to cease operations and that it be awarded the grant of the permanent license for Biltmore Forest, to the exclusion of the competing applicants.

Orion filed a notice of appeal (Case No. 96-1430) with the D.C. Circuit and requested a stay of the FCC's decision. In its motion for stay, Orion alleged "irreparable" harm if it was required to cease its operations in favor of the joint interim operator. On February 27, 1997, the D.C. Circuit denied Orion's motion for stay.

Senators Helms and Faircloth, along with Congressman Charles Taylor (R-NC), who represents the community of Biltmore Forest, thereafter intensified their ex parte campaign to influence the FCC to favor Orion. On May 9, 1997, Senator Faircloth introduced legislation in the U.S. Senate to require the FCC to award the Biltmore Forest FM frequency to Orion. However, it was ruled out of order by the Senate.

The FCC directed Orion to cease operations on June 2, 1997, in favor of the joint interim operator. With the support of Senators Helms and Faircloth, Orion defied the order of the FCC and continued operating for most of the day of June 2. This operation caused harmful interference to the operations of the joint interim operator.

Orion ceased operations late in the day of June 2, but only under threat of sanctions from the FCC. Orion publicly boasted that the D.C. Circuit would put it back on-the-air by the end of the year.

Orion commenced a national public relations offensive which touted its support from Senators Helms and Faircloth. This

included a feature front page article in the Wall Street Journal on June 18, 1997, that suggested the FCC had engaged in political favoritism and corruption in favor of "liberal Democrats."

Orion also commenced a national direct mail fund raising campaign. The fund raising campaign was directed to political donors of Senator Helms and Faircloth and made overtly partisan and racial appeals.

In its fund raising appeal, Orion claimed that it was the victim of "liberal Democratic" and "Clinton" appointees at the FCC who were trying to destroy it because its owners were not "minorities" and were not "politically correct" (i.e., were white males). Orion attacked the competing applicants and the joint interim operator because one of the competing applicants includes Mel Watt, who is a "liberal Democratic" Congressman from North Carolina. See, attached mass mailing letter on behalf of Zeb Lee and Orion.

In October 1997, Senator Jesse Helms placed a hold on the nomination of William Kennard to be Chairman of the FCC. According to Senator Helms, Mr. Kennard was part of a "liberal Democratic" and African-American conspiracy at the FCC to take Orion off-the-air. Senator Helms would release the hold only if Mr. Kennard agreed to immediately put Orion back on-the-air and award it the FM license for Biltmore Forest through a comparative criteria which would not include an auction. See, attached press reports.

In questions from Senator Helms to Mr. Kennard, Senator Helms

attacked Mr. Kennard for his lack of "objectivity and judgment" as General Counsel in handling the Orion application and the Biltmore Forest proceeding. In response, Mr. Kennard indicated that he would recuse himself from this proceeding. See, attached responses of Mr. Kennard to Senator Helms, dated October 6, 1997.

Senator Helms charged that Mr. Kennard, as FCC General Counsel, had been influenced by "liberal Democratic" Congressman Mel Watt of North Carolina to force Orion off-the-air. Mr. Watt is an African-American and is an 8% non-voting stockholder in Skyland Broadcasting Company, which is one of the five competing applicants in the Biltmore Forest FM proceeding and which is a member of the joint interim operation.

Senator Helms also charged that Mr. Kennard had conspired with Harvey Gantt to force Orion off-the-air. Mr. Gantt is an African-American who ran against Senator Helms as the Democratic nominee in 1990 and 1996 and is a political ally of Mr. Watt. See, attached responses of Mr. Kennard to Senator Helms, dated October 6, 1997.

Orion filed with the D.C. Circuit, on June 11, 1997, a motion to compel the FCC to disclose certain internal staff documents which related to the decision to take it off-the-air on June 2, 1997. Orion believed that these documents were a "smoking gun" which would demonstrate improprieties by the FCC. The D.C. Circuit denied the motion.

The staff of Senator Helms investigated the charges of a "liberal Democratic" and African-American conspiracy at the FCC

against Orion. This included sworn testimony from Mr. Kennard, who claimed that he did not know Mr. Watt or Mr. Gantt. See, attached responses of Mr. Kennard to Senator Helms, dated October 6, 1997.

Senator Helms has presented no evidence to support his allegations against Mr. Kennard. After a private meeting between the two in the Senator's office, Senator Helms withdrew his hold on Mr. Kennard's nomination for Chairman and announced his support. See, attached press reports and Congressional Record, October 27, 1997, pp. 11308-11310.

According to Senator Helms, Mr. Kennard has given his "voluntary assurance that he will work with us" on the Orion case. In a Senate speech the same day, Senator Helms strongly criticized the FCC for the manner in which it has handled Orion's application and he anointed Orion as the rightful licensee for the Biltmore Forest FM frequency. See, Congressional Record, p. S11309.

Senator Helms stated that the FCC had "curiously disqualified" Orion as an applicant for the Biltmore Forest FM frequency; that other competing applicants were basing their applications "purely on provisions favoring minorities and women"; that Orion was the most qualified applicant because its principals had successfully operated an AM broadcast station in Asheville and had pledged to be day-to-day managers of the Biltmore Forest FM station; that applicants proposing such day-to-day management should be favored over passive investor applicants; that the FCC had "amazingly forced Orion off-the-air"; that he and Mr. Kennard want to rectify

this "awkward and unjustifiable" situation; and that the U.S. Court of Appeals for the D.C. Circuit will "shortly issue a decision in the near future" about "the manner in which the FCC handled Orion's application." See, Congressional Record, pp. S11308-11309.

Senator Helms criticized the Bechtel decision as unfair to Orion because it had prevailed at the FCC under the "integration" criteria which that decision had later struck down. Although Senator Helms generally favors the use of auctions to award broadcast licenses, he does not want the Biltmore Forest FM frequency, or any other of the 25-30 cases "already in the FCC pipeline," to be awarded by auction. See, Congressional Record, p. S11309.

Senator Helms stated that Mr. Kennard "clearly feels that the FCC can conduct hearings on this small group and class of applicants using new comparative criteria." Moreover, Senator Helms stated that he "had been given assurances satisfactory to him by Mr. Kennard that he will, within statute and regulation, work in good faith with him and others to resolve the problems that the Bechtel decision caused. See, Congressional Record, p. S11309.

Mr. Kennard stated in response to questions from Senator Helms that the Bechtel decision has caused "unfairness to many applicants" and that he is "quite sympathetic to their predicament." He believes that the FCC should consider arguments that "particular classes of pending applicants should be treated differently." According to questions submitted by Senator Helms to

Mr. Kennard, Senator Helms wants the FCC to decide cases, such as the Biltmore Forest FM proceeding, under the existing hearing record, pursuant to such "special rules" as the FCC might adopt. See, Congressional Record, p. S11309.

In a October 21, 1997, letter from Senator Helms to Senator John McCain (R-AZ), Senator Helms referred to numerous discussions their staffs had about the "FCC's treatment of Orion" and that Orion and about 25-30 other applicants "were left stranded in the regulatory process by the Bechtel decision."

Senator Helms stated in the October 21, 1997, letter that the FCC "interprets [the Balanced Budget Act] as giving it the authority to decide whether these 25-30 applicants be judged on the basis of the comparative hearing process." Senator Helms believes that the comparative hearing process should be used for these applicants. In the event that the courts question this interpretation, Senator Helms wants to "swiftly move legislation through the Senate to overturn any such court ruling." See, Congressional Record, pp. S11309-11310.

In a letter of October 23, 1997, from Senator McCain to Senator Helms, Senator McCain affirmed Senator Helms' interpretation that the Balanced Budget Act allows the FCC to use comparative hearings in proceedings such as Biltmore Forest. According to Senator McCain, in the "unlikely event that any future court decision misconstrues the [Balanced Budget Act], he will do whatever is necessary to secure the passage of legislation that

will restate the terms of the statute as reflected in his letter." See, Congressional Record, p. S11310.

The Asheville Citizens-Times, in an editorial, praised Senator Helms' "strong-arm tactics" in blocking the nomination of Mr. Kennard to be Chairman. It opined that Mr. Kennard should get the Chairmanship only if he agreed to help Orion obtain the license for the Biltmore Forest FM frequency. The editorial noted that in the event that the FCC puts the frequency up for auction pursuant to the Balanced Budget Act, Senator Faircloth would "push for a legislative solution to the frequency if needed." See, attached copy.

The Winston-Salem Journal, in an editorial, accused Senator Helms of "extortion" and lamented that he got from Mr. Kennard what he wanted --- the Biltmore Forest FM license for Orion worth some \$6 Million in exchange for the FCC Chairmanship. See, attached copy.

The Wall Street Journal noted in article on July 28, 1997, that because of Senator Helms' threatened hold on Mr. Kennard's nomination to be Chairman in view of his disapproval of the FCC's role in forcing Orion off-the-air, the White House would "push him as a package" with the other Commissioner nominees, Gloria Tristani, Michael Powell, and Harold Furchtgott-Roth.

The joint interim operator filed an ethics complaint with the U.S. Senate against Senator Helms. The complaint charged that Senator Helms violated Senate Ethics Rules and Federal law, in 5

U.S.C. 557 (d) and 47 U.S.C. 502, through his abuse of the powers and privileges as a U.S. Senator and through other improper actions in influencing the FCC in a restricted adjudicative proceeding to favor Orion over the joint interim operator and the competing applicants. See also, 47 C.F.R. 1.1208 and 1.1210.

The ethics complaint specifically centered on Senator Helms' improper hold on the nomination of Mr. Kennard and the release of the hold in exchange for favorable action by Mr. Kennard and the FCC on the Orion application for the Biltmore Forest FM frequency, to the detriment of the joint interim operator and the competing applicants. The Biltmore Forest FM frequency has a monetary value of some \$6 Million Dollars. The Chairmanship of the FCC has monetary value based upon a salary funded by the taxpayers and based upon future earnings potential in the private sector after serving as Chairman.

In a November 20, 1997, reply to the ethics complaint, Senator Helms acknowledged that he and Senator Faircloth expressed their judgment in an October 22, 1996, letter to the FCC that its "decision to revoke [Orion's] license ... was unjustifiable and ought to be reconsidered." Senator Helms stated that "the current Chairman [Mr. Kennard] apparently agreed ..."

Senator Helms further stated that "after [Mr. Kennard's] recusal from the [Orion] matter, and before his confirmation, I met with him to discuss, among other things, the difficulties of implementing the Bechtel decision" and that he "appreciated Mr.

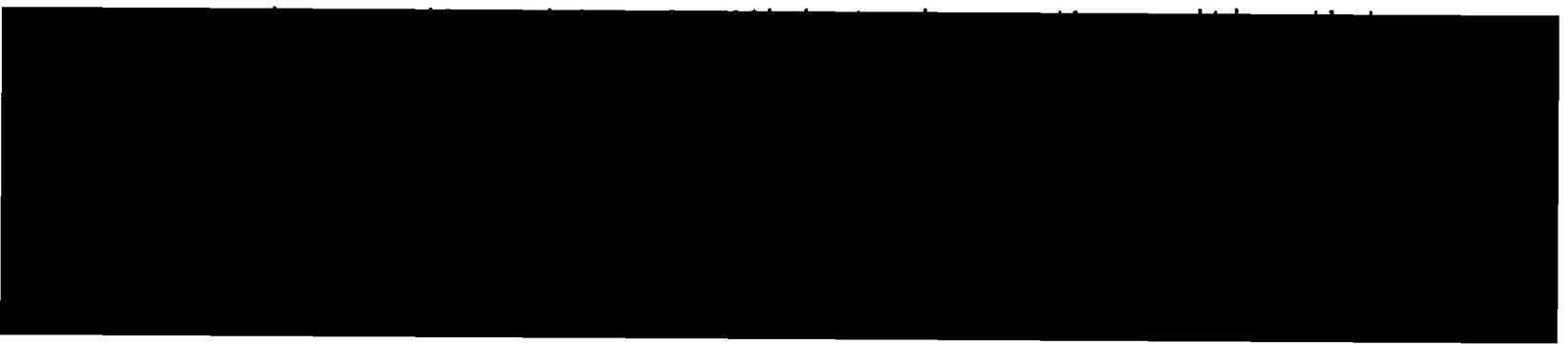
Kennard's candor ... and assurances that he will ... work in good faith with me and others to resolve the problems associated with the Bechtel decision."

Although Senator Helms stated that his "support" for Mr. Kennard's "nomination did not depend on the outcome of any specific adjudication," he omitted to state whether the release of the hold on Mr. Kennard's nomination depended on the outcome of any specific adjudication. See, attached copy.

On November 26, 1997, the FCC issued its rulemaking to implement the auctions authorized in the Balanced Budget Act, which was adopted July 1, 1997. Although the legislative history requires the FCC to use auctions in all pending unresolved proceedings and the legislation refers only to auctions as the authorized method of selection, the FCC nevertheless solicited comments, at para. 22, as to use of comparative hearings in a certain sub-set of approximately 20 applications which previously went through a comparative hearing and a preliminary decision thereto was rendered prior to the Bechtel decision.

This solicitation of comments by the FCC as to use of comparative hearings was part of the agreement between Senator Helms and Mr. Kennard to release the hold on his nomination to be Chairman.

Commissioner Susan Ness, the only incumbent on the Commission, is quoted in MediaWeek, January 5, 1998, p. 19, as "concerned that



already exist in some of the outstanding radio license cases, including Lee's [Orion]."

The quote from Commissioner Ness is in an article specifically addressing the merits of the Orion application and the FCC's handling of its application. Commissioner Michael Powell is also referenced in the article as weighing in on the merits of an auction.

On December 19, 1997, the D.C. Circuit issued its decision as to Orion's appeal of the FCC's order to take it off-the-air on June 2, 1997. The decision reversed the FCC and ordered it "to reinstate Orion forthwith as the interim licensee."

The decision indicated that Orion would suffer "irreparable harm" if not allowed to immediately resume operations. However, this ruling is inconsistent with the D.C. Circuit's February 27, 1997, ruling denying Orion's motion for stay, wherein Orion contended under the same factual and legal arguments that it would suffer "irreparable harm" if was required to cease operations in favor of the joint interim operator.

The only changes in the facts and circumstances between February 27, 1997, and December 19, 1997, are the public pronouncements and actions by Senator Helms and Faircloth demanding that Orion be put back on-the-air and awarded the FM license for Biltmore Forest and that, if the FCC and the D.C. Circuit did not obey their directive, legislation would be swiftly adopted to nullify any decisions of the FCC and the D.C. Circuit which did not

favor Orion.<sup>1/</sup> See, Congressional Record, October 27, 1997, pp. S11308-11310.

The FCC stated that it would not appeal the December 19, 1997, decision, even though that decision harshly criticized it for taking Orion off-the-air on June 2, 1997, and even though the decision determined that the FCC acted arbitrarily and without color of law. The court then immediately issued the mandate to prevent the joint interim operator, an intervenor in the appeal, from taking its own appeal and to immediately force the joint interim operator off-the-air in favor of Orion.

The December 19, 1997, decision chastised the FCC for not using an "integration" comparative criteria and for not using the existing hearing record in selecting the interim operator for the Biltmore Forest FM frequency; praised the past broadcast record of Orion's principals; suggested the competing applicants "lacked integrity"; faulted the competing applicants for appealing the FCC's 1992 decision awarding the Biltmore Forest FM frequency to Orion because otherwise Bechtel would not have applied to Orion; faulted the joint interim operator for the manner in which it commenced operations; made post hoc rationalizations to validate the "reasonableness" of Orion's actions in constructing and operating the Biltmore Forest FM station with at best a conditional permit from the FCC; and faulted the FCC for not considering

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<sup>1/</sup> Senators Helms and Faircloth have a previous history of accepting substantial campaign contributions in return for sponsoring legislation to nullify Federal court decisions that are adverse to the donor. See, Forbes Magazine, May-June 1997.

Orion's investment in constructing the station.<sup>2/</sup> See, decision, pp. 3, 5-10, 12.

The decision is based upon factual and legal arguments not made by Orion to the court --- that Orion "reasonably" relied upon a June 27, 1994, grant of an auxiliary permit by the FCC to justify its May 27, 1994, commencement of construction and investment in the Biltmore Forest FM station. The decision also exceeded the lawful authority of a Federal appeals court by ordering the FCC to immediately put Orion on-the-air without first considering the merits of the interim application of the joint interim operator, or comparing it with Orion's proposal. See, decision, pp. 9, 12.

The decision, moreover, held that 47 C.F.R. 73.3592 (b) and Consolidated Nine, Inc. v. FCC, 403 F.2d 585, which govern interim operations, are not applicable to the Biltmore Forest proceeding. See, decision, pp. 6-7.

Orion is back on-the-air on the Biltmore Forest FM frequency and has authority from the FCC to operate until a permanent grant of the license is made. See, Order, FCC 98-4, rel. January 16, 1998. Orion stated in filings with the D.C. Circuit that the FCC should now take as much time as possible to decide the auction/comparative hearing rulemaking.

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<sup>2/</sup> Orion's "reasonable" actions in constructing and operating the Biltmore Forest FM station, with at best a conditional permit from the FCC, included incurring a substantial loan that was collateralized only by the station. Orion was represented before Congress and the court by lobbyist-lawyers who normally represent banks and their financial interests.

## Willsyr's Comments

### (a) Proposed Use of Comparative Hearings

The "Notice of Proposed Rulemaking," at paras. 13-22, requested comments as to whether comparative hearings, instead of auctions, should be used to select among applicants who filed prior to July 1, 1997. In particular, the FCC requested comments as to whether comparative hearings should be used in a sub-set of about twenty proceedings where a decision under the "integration" comparative criteria was rendered by an ALJ, the Review Board, or the FCC, prior to the Bechtel decision invalidating that criteria. Willsyr is an applicant in the Biltmore Forest, North Carolina, proceeding, which is one of the twenty proceedings in that sub-set.

#### (1) Congressional Political Influence or Pressure to Benefit the Application of Orion

The FCC is considering the use of comparative hearings, instead of auctions, because U.S. Senator Jesse Helms made this demand as a condition for releasing his hold on the nomination of William Kennard to be Chairman of the FCC. Senator Helms demands the use of comparative hearings because he believes that it would benefit Orion Communications Limited ("Orion") and lead to its grant of a permanent license. Orion is one of five competing applicants (along with Willsyr) in the Biltmore Forest proceeding. See, attached press reports and Congressional Record, October 27, 1997, pp. S11308-11310.

Senator Helms favors the grant of Orion's application in the Biltmore Forest FM proceeding, to the exclusion of the other

competing applicants. This is in part because one of the competing applicants, Skyland Broadcasting Company, includes as a principal Mel Watt, who is a Democratic Congressman from North Carolina. Mr. Watt is an African-American and a political ally of Harvey Gantt, who is a long-time political adversary of Senator Helms.

Senator Helms also favors the grant of Orion's application because it is the only applicant in the Biltmore Forest FM proceeding that is headed by a white male. The other competing applicants are headed by African-Americans, Native American Indians, or females.

A Federal administrative agency action is invalid if based in whole or in part on Congressional pressures. Congressional interference so tainting the administrative process violates the right of a party to due process. The appearance of bias or pressure may be no less objectionable than the reality. ATX, Inc. v. U.S. Dept. of Transportation, 41 F.3d 1522, 1527 (D.C. Cir. 1994). See also, In Re Murchison, 349 U.S. 133, 136 (1955); Pillsbury Co. v. FTC, 354 F.2d 952, 964 (5th Cir. 1966), the right of parties to the appearance of impartiality cannot be maintained unless decision makers are free from powerful external political influences.

Senator Helms' improper interference is demonstrated by the fact that Mr. Kennard has stated that he is recusing himself from the Biltmore Forest FM proceeding because of his contacts with the Senator as to the merits of Orion's application. Pillsbury Co. v.

FTC, 354 F.2d at 964, a member of Congress subjecting a Federal agency nominee to a searching examination as to how and why he reached his decision in a case still pending before him, and to criticize him for reaching the wrong decision, sacrifices the appearance of impartiality and thus taints the proceeding. See, responses of Mr. Kennard to Senator Helms, October 6, 1997, and Congressional Record, October 27, 1997, pp. S11308-11310.

Such political interference by a member of Congress can not be "shrugged off" merely because the nominee or agency official should be able to discount what is said by the member of Congress and to disregard the force of the [political] intrusion into the adjudicatory process. Pillsbury Co. v. FTC, 354 F.2d at 964.

Senator Helms' improper influence in causing comparative hearings to be considered in the November 26, 1997, auction rulemaking is demonstrated by the fact that the FCC previously considered the adoption of "new" comparative criteria and concluded that no such criteria could be adopted consistent with the requirements of Bechtel. See, responses of Mr. Kennard to Senator Helms, October 6, 1997, p. 2. In Bechtel v. FCC, 10 F.3d at 887, the D.C. Circuit recognized the potential for "graft and corruption" in any comparative hearing criteria because of its inherent subjectivity.

The fact of Senator Helms' intervention in the auction rulemaking to demand the use of comparative hearings and the adoption of "new" comparative criteria to benefit or cause the

grant of Orion's application, requires that this aspect of the rulemaking be invalidated. ATX, Inc. v. U.S. Dept. of Trans., 41 F.3d at 1527; In Re Murchison, 349 U.S. at 136; Pillsbury Co. v. FTC, 354 F.2d at 964.

Accordingly, because the adoption or use of comparative hearings, or any "new" comparative criteria, would be politically "tainted," the FCC is legally foreclosed from the adoption or use of such comparative hearings or criteria.

(2) Public Comments by an FCC Commissioner as to the Merits of Orion's Application and the Auction Rulemaking

Commissioner Susan Ness has recently made public comments as to the merits of Orion's application and the auction rulemaking. According to a quote in MediaWeek, January 5, 1998, p. 19, Commissioner Ness "is concerned that auctions, while quick and efficient, ignore the equities that already exist in some of these outstanding radio license cases, including Lee's [Orion]."

These public comments by Commissioner Ness indicate that she has been presented and has considered non-record evidence with respect to both the merits of Orion's application and the merits of the auction rulemaking. Accordingly, Commissioner Ness (and the other Commissioners) should fully disclose any ex parte contacts that have had with respect to the merits of Orion's application and the merits of the auction rulemaking. They should then determine whether to recuse themselves from these proceedings in order to prevent the appearance that they have prejudged the merits of the proceedings, or to prevent the appearance of any impropriety.

(3) Orion's Construction and Investment in the Biltmore Forest FM Station Based Upon a Conditional Construction Permit from the FCC

Senator Helms has attacked both the FCC's handling of Orion's application and the Bechtel decision as "unfair" to Orion. According to Senator Helms, this has put Orion in an "awkward" situation. See, responses of Mr. Kennard to Senator Helms, October 6, 1997, and Congressional Record, October 27, 1997, p. 11308.

Orion is in an "awkward" situation because, as a result of IRS tax liens against its principals and their AM station, it constructed and operated the Biltmore Forest FM station, although at the time it had only at best a conditional construction permit from the FCC. The grant of the permit was based upon the "integration" comparative criteria. However, the Bechtel decision invalidated that grant and the D.C. Circuit subsequently reversed the decisions of the FCC in favor of Orion and remanded all of the competing applicants for a new proceeding based upon a new selection criteria free of the "integration" standard.

Because Orion has already made a substantial investment in the Biltmore Forest FM station, by incurring substantial loans that are collateralized by the station to pay IRS tax liens and depend upon cash flow from the station to re-pay the loan, it is in a situation where it can not afford to lose in the FCC proceeding and where it can not afford to pay for the license in an auction.

Consolidated Nine, Inc. v. FCC, 403 F.2d 585, 589, observed that the mere fact of a substantial investment in a station by an applicant before a final grant would prejudice the other competing